IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

NYAROK CHAN
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL NO: 09A-UI-06668-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/09
Claimant: Appellant (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Nyarok Chan (claimant) appealed an unemployment insurance decision dated March 25, 2009, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Rembrandt Enterprises, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 27, 2009. The claimant participated in the hearing. Nyigeelo Gon interpreted on behalf of the claimant. The employer participated through Sally Brecher, Human Resources Manager and Velia Cruz, Manager. Exhibit D-1 was admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant's appeal is timely, and if so, whether she was discharged for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: A disqualification decision denying benefits was mailed to the claimant's last-known address of record on March 25, 2009. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 4, 2009. The appeal was not filed until April 29, 2009, which is after the date noticed on the disqualification decision. The claimant filed her appeal late because she does not speak English very well and she contends Iowa Workforce Development did not tell her she had to appeal until after the appeal was late.

The claimant was employed as a full-time general laborer from October 13, 2008 through March 2, 2009 when she was discharged. She had received a warning for attendance on December 17, 2008. The claimant's treating physician restricted her from working more than eight hours per day as of January 27, 2009 due to a non-work-related medical condition. Her manager met with all the employees on February 4, 2009 and advised all employees they could

not punch in earlier than ten minutes prior to the beginning of their shifts. The claimant signed an acknowledgement of this policy.

She violated this policy and her doctor's restrictions by clocking in early several times. Her shift started at 9:30 a.m. and went to 6:00 p.m. The claimant clocked in at 9:15 a.m. on February 15; 9:10 a.m. on February 16; 9:06 a.m. on February 17; 9:08 a.m. on February 18; and 9:20 a.m. on February 19. In addition to verbal warnings, the employer issued her a final disciplinary warning on February 25, 2009. The claimant was subsequently discharged on March 2, 2009 for violating her doctor's restrictions on two dates, which had actually occurred prior to the final warning. She clocked in at 9:18 a.m. on February 23, 2009 and clocked out at 6:07 p.m. The claimant clocked in on February 24, 2009 at 9:20 a.m. and out at 6:05 p.m.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed in this case is whether the claimant's appeal is timely.

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Due to the claimant's lack of understanding of the English language, she did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was timely filed pursuant to Iowa Code § 96.6-2, and the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The substantive issue to be determined in this case is whether the claimant was discharged for work-related misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer

> has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was given a final warning on February 25, 2009 but she was subsequently discharged for violations on February 23, 2009 and February 24, 2009. There were no violations after she received a final warning. The employer has not met its burden. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The claimant's appeal is found timely. The unemployment insurance decision dated March 25, 2009, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/css